APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 11, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-50507

UNITED STATES of America, ex rel., Toni R. BARRON; Vicky J. Scheel,

Plaintiffs-Appellants,

versus

DELOITTE & TOUCHE, L.L.P.; Deloitte & Touche Consulting Group, L.L.C.; DELOITTE & TOUCHE CONSULTING GROUP HOLDING, L.L.C.; MEDICAID CLAIM SOLUTIONS OF TEXAS, INC.; NATIONAL HERITAGE INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before KING, Chief Judge, and REAVLEY and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

This is a qui tam action under the False Claims Act, 31 U.S.C. § 3729, against National Heritage Insurance

Company ("NHIC"), Deloitte & Touche, and Medicaid Claim Solutions of Texas (collectively, "Defendants"). Toni Barron and Vicky Scheel ("Relators") assert that Defendants participated in the knowing submission to the United States of false claims for Medicaid reimbursement. Relators, who are both medical professionals, maintain that they learned of Defendants' false claims in the course of providing therapeutic services to students in several Texas public school districts. According to Relators, consultants from both Deloitte and Medicaid Solutions alerted local school districts to the opportunity to gain reimbursement through Medicaid for health services that the districts were already providing. Those consultants also allegedly instructed the districts to maximize their recovery through improper billing practices. Relators further aver that NHIC, which processes claims and distributes federal Medicaid funds for the State of Texas, acquiesced in the fraudulent billing practices described in the complaint. The district court concluded that any action arising out of NHIC's role as a Medicaid fiscal intermediary is barred by Texas's Eleventh Amendment immunity. We disagree.[1]

This court reviews the issue of Eleventh Amendment immunity *de novo*. *Cozzo v. Tangipahoa Parish Council—President Gov't*.[2] In order to determine whether the district court properly concluded that NHIC is an arm of the state

1. In an accompanying unpublished disposition, we reverse the district court's dismissal of Relators' claims against Defendants under the public-disclosure bar of the False Claims Act.

2. 279 F.3d 273, 280 (5th Cir.2002).

and thus entitled to sovereign immunity from this damages action, we employ a six factor test:

> 1. Whether the state statutes and case law view the agency as an arm of the state;
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> 2. The source of the entity's funding;
>
> 3. The entity's degree of local autonomy;
>
> 4. Whether the entity is concerned primarily with local as opposed to statewide, problems;
>
> 5. Whether the entity has the authority to sue and be sued in its own name;
>
> 6. Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans.[3] This *Clark* test seeks to determine "if the state is the real, substantial party in interest because the suit seeks to impose a liability which must be paid from public funds in the state treasury."[4]

The second *Clark* factor—the source of the entity's funding—is the weightiest factor, and it is controlling here. *See Vogt v. Bd. of Comm'rs*.[5] The Eleventh Amendment exists

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3. 174 F.3d 677, 679 (5th Cir.1999) (summarizing six factor test developed in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir.1986)).

4. *Hudson*, 174 F.3d at 681 (internal citation and quotation marks omitted).

5. 294 F.3d 684, 693 (5th Cir.2002).

mainly to protect state treasuries. *See id.* To determine if the state treasury is being protected, this court looks first to whether the state would be liable for a judgment against the defendant and then to whether the state would be liable for the defendant's "general debts and obligations." *Hudson.*[6] In this case, the state is neither directly responsible for a judgment, nor would it indemnify the defendant. The contract between NHIC and the State of Texas resolves the matter because it dictates that NHIC is to pay its own judgments and indemnify the State from any liability.[7] Additionally, the parties do not contend that the State is responsible for NHIC's general debts and obligations. This court's inquiry about a

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6. 174 F.3d at 687.

7. The contract states:

> To the extent authorized by law, [NHIC], as an independent contractor, agrees to hold STATE AGENCY and its board members, contractors, subcontractors, independent consultants and their subcontractors and consultants and/or federal government harmless and to indemnify them from any and all liability, suits, claims, losses, damages and judgments, and shall pay all costs, fees and damages to the extent that such costs, fees and damages arise solely from performance or non-performance of CONTRACTOR under this Contract.

NHIC responds by pointing out that, under the parties' contract, it is not required to indemnify the State for losses caused by its prudent conduct in conformity with instructions given by the State. Even so, the aspect of the contract that is significant for the *Clark* analysis is NHIC's obligation to pay any damages resulting from its performance. This clause conclusively establishes that Texas will suffer *no legal liability* for any damages assessed against NHIC.

judgment's effect on state treasuries does not extend to suppositions about whether NHIC will: (1) pay its judgment from funds derived from the state for performing its contractual obligations; (2) attempt to pass on future litigation costs to the state through higher prices; or (3) demand future indemnification agreements or contribution to future judgments. *See Williams v. Dallas Area Rapid Transit*[8]; *Pendergrass v. Greater New Orleans Expressway Comm'n*[9]; *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall.*[10]

Turning to the other *Clark* factors, the court is to look at how state statutes and case law characterize NHIC. Texas law does authorize the Texas Department of Health to "use any fiscal intermediary" to assist in the administration of federally authorized medical-assistance programs. Tex. Hum. Res.Code Ann. § 32.029(b) (Vernon 2001). But no indicia

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8. 242 F.3d 315, 319 (5th Cir.2001) (stating that "we do not consider a state's voluntary, after-the-fact payment of a judgment to be a liability against the state's treasury").

9. 144 F.3d 342, 346 (5th Cir.1998) (finding the second *Clark* factor to weigh heavily against immunity when the state would not pay the judgment and the possible loss of surplus funds to the state to be "too indirect and too remote to characterize it as a potential liability of the state treasury or to make the state the real, substantial party in interest.").

10. 355 F.3d 1140, 1147 (9th Cir.2004) (denying Eleventh Amendment immunity to a private contractor in part because there was no evidence that the state university that hired the contractor would have "a legal obligation to pay a judgment against" the contractor).

of state law—"constitution, laws, judicial opinions, attorney general's opinions, [or] other official statements"[11]—identify NHIC as something other than a purely private corporation. In particular, there is no state case law identifying NHIC as an arm of the state. *See Jacintoport Corp. v. Greater Baton Rouge Port Com'n.*[12]

The third *Clark* factor, the entity's degree of local autonomy, is difficult to evaluate in the context of a private corporation. Most "arm of the state" cases address the distinction between local and state control. *See, e.g., Minton v. St. Bernard Parish Sch. Bd.*[13] NHIC has little discretion in executing its contract with the State; the State provides NHIC with specific instructions on how to pay Medicaid claims for the school-based health services that are at issue in this case. Yet, NHIC is an autonomous entity; the State neither appoints nor approves of NHIC's board of directors or its corporate officers. *Cf. Delahoussaye v. City of New Iberia.*[14] Moreover, to determine an entity's autonomy, this court is directed to look at the " 'extent of the [entity's] independent management authority,' not just the independence of the

11. *Hudson*, 174 F.3d at 683.

12. 762 F.2d 435, 439 (5th Cir.1985) (focusing on state cases as a determinative inquiry under the Eleventh Amendment).

13. 803 F.2d 129, 131-32 (5th Cir.1986) (emphasizing school boards' discretion in "performing their functions and addressing their innately local concerns").

14. 937 F.2d 144, 148 (5th Cir.1991) (finding this factor points toward immunity when the state appoints members of the organization as well as supervises and manages the entity's functions).

individual [board members]." *Jacintoport Corp.*[15] As a private corporation, NHIC has the independent authority to make internal decisions about compensation and the authority to contract for needed services. Additionally, even if we were to conclude this factor weighed in favor of NHIC's immunity, control is not a dispositive factor. *See Hess v. Port Auth. Trans-Hudson Corp.*[16]

The fourth *Clark* factor, the entity's concern with "local, as opposed to statewide, problems,"[17] is also difficult to assess for a private corporation. The usual test is "whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants." *Pendergrass.*[18] In acting as Texas's claim administrator, NHIC demonstrates a concern for a statewide rather than local problem. But, of course, private corporations operate for the benefit of their investors, rather than the State. *See generally* Tex. Bus. Corp. Act Ann. art. 13.06 § A (Vernon 2003); *Dunagan v. Bushey.*[19]

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15. 762 F.2d at 442.

16. 513 U.S. 30, 48 (1994) (explaining that "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury").

17. *Clark,* 798 F.2d at 745.

18. 144 F.3d at 347.

19. 263 S.W.2d 148, 152 (Tex. 1953) ("The directors of a corporation stand in a fiduciary relationship to the corporation and its stockholders, and they are without authority to act as such in a matter in which a director's interest is adverse to that of the corporation.")

The last two *Clark* factors also weigh against granting immunity. NHIC has the "authority to sue and be sued in its own name" and may "hold and use property." *Clark*.[20]

We conclude that NHIC is not an arm of the State of Texas and is therefore not shielded by Eleventh Amendment immunity.

We observe, however, that several district courts have held NHIC to be an arm of the State of Texas. *See Texas Hosp. Ass'n v. National Heritage Ins. Co.;*[21] *United States ex rel. Churchill v. Texas;*[22] *United States v. Mack;*[23] *St. Joseph Hosp. v. Elec. Data Sys. Corp.*[24] These cases rely primarily on a combination of four arguments: (1) the requested or ultimate relief in a given case would be an increased outlay of Medicaid funds which would come directly from the State; (2) since some NHIC funds come from the State, the judgment is inevitably paid by the State; (3) all fiscal intermediaries are immune under Fifth Circuit precedent; and (4) NHIC's lack of discretion renders it an agent of the State. We do not find these arguments to be persuasive.

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20. 798 F.2d at 745.

21. 802 F.Supp. 1507, 1512 (W.D.Tex.1992).

22. 2000 WL 33706360, at *6 (W.D.Tex. Nov.15, 2000).

23. 48 F.Supp.2d 708, 713-14 (S.D.Tex.1999).

24. 573 F.Supp. 443, 449-50 (S.D.Tex.1983).

First, some of the decisions rely in part on the fact that the relief requested by the plaintiffs would involve an increased outlay of Medicaid funds coming directly from the State. *See Churchill;*[25] *see also Texas Hosp. Ass'n.*[26] But, here, the requested damages sought by Relators would not come from Medicaid outlays; those damages would be paid by NHIC from its corporate funds.[27]

A second (related) line of reasoning contends that NHIC should be granted immunity simply because it might use funds earned through its contract with the State to pay any damages award. *Churchill;*[28] *Mack.*[29] Accepting this argument

25. 2000 WL 33706360 at *4.

26. 802 F.Supp. at 1512.

27. Both the *Churchill* and *Texas Hospital Ass'n* courts also assert that NHIC is entitled to immunity because a judgment against it would require Texas officials to take certain actions to comply with federal law. *See Churchill,* 2000 WL 33706360, at *5; *Tex. Hosp. Ass'n,* 802 F.Supp. at 1512. But, under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), the Eleventh Amendment does not bar suits seeking to compel state officers to comply prospectively with the requirements of federal law, even when the costs of those prospective compliance efforts could be quite high. *See Quern v. Jordan,* 440 U.S. 332, 337 (1979). Thus, even if we were to treat NHIC like a state official (as it maintains we should do), established principles of state-sovereign immunity would permit an award of relief affecting the future administration of Texas's Medicaid program.

28. 2000 WL 33706360 at *5.

29. 48 F.Supp.2d at 713 ("[A]n award of damages against NHIC would be paid out of funds NHIC receives from the State of Texas. Put another way, NHIC would not be in a position to be sued by [plaintiff] if it was not paid by the State of Texas to run the state's Medicaid program.")

would convert all private contractors, not just fiscal intermediaries, into immune agents whenever they are doing work for the State. In addition, as we explained above, the prospective impact on the state's treasury is not the same as the *Clark* inquiry into direct implications for the state fisc.

Another ground offered in favor of immunity relies on Fifth Circuit precedent where *Medicare* fiscal intermediaries are entitled to federal immunity.[30] *See Matranga v. Travelers Ins. Co.*;[31] *Peterson v. Blue Cross/Blue Shield of Texas*;[32] *Peterson v. Weinberger.*[33] In *Weinberger* (the case on which *Matranga* and *Blue Cross/Blue Shield* depend), the fiscal intermediaries in question were governed by regulations that provided that "[i]n the performance of their contractual undertakings, the carriers act on behalf of the Secretary, carrying on for him the administrative responsibilities imposed by law. The Secretary, however, is *the real party in interest* in the administration of the program. . . ." 20 C.F.R. § 405.670 (1973) (emphasis added). There is no similar state regulation here to make Texas the real party in interest in this suit against NHIC, a *Medicaid* fiscal intermediary.

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30. This view is taken in *Mack*, 48 F.Supp.2d at 713-14; *Texas Hosp. Ass'n*, 802 F.Supp. at 1512; *St. Joseph's Hosp.*, 573 F.Supp. at 450.

31. 563 F.2d 677, 677 (5th Cir.1977) (per curiam).

32. 508 F.2d 55, 57-58 (5th Cir.1975).

33. 508 F.2d 45, 51-52 (5th Cir.1975).

Two district court cases rely on a fourth rationale, holding that, since NHIC lacked discretion and acted as an "agent of the state," it should be immune. *Texas Hosp. Ass'n;*[34] *St. Joseph's Hosp.*[35] NHIC presses this reasoning, arguing that it should be immune from damages just like a state agent or a state employee sued in her official capacity. We are not persuaded. An individual state officer sued in her official capacity for damages is entitled to Eleventh Amendment immunity precisely because the state that employs her is the real party in interest. But, when an entity (as opposed to an individual) is the defendant, the *Clark* analysis conducted above is designed specifically to determine whether a suit against that entity is, in fact, one against the state itself. *See Daniel, Mann, Johnson & Mendenhall.*[36] And, here, that analysis reveals that Texas is not the real party in interest in Relators' action against NHIC.[37]

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34. 802 F.Supp. at 1512.

35. 573 F.Supp. at 450.

36. 355 F.3d at 1147 (holding that the "arm of the state" test for sovereign immunity is the proper analysis to be undertaken in determining whether a private contractor is immune from suit under False Claims Act).

37. We also note that performance of state functions alone is insufficient to create immunity. Indeed, the Supreme Court has demonstrated its willingness to allow disparate treatment for state and private employees performing the same functions. *See Richardson v. McKnight,* 521 U.S. 399, 413 (1997) (holding that employees of private prisons are not entitled to qualified immunity in § 1983 suits, even though employees of state-run prisons do enjoy that immunity).

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Nevertheless, NHIC urges us to follow the Eleventh Circuit's decision in *Shands Teaching Hospital & Clinics, Inc. v. Beech Street Corp.*[38] *Shands* held that Eleventh Amendment immunity precluded a hospital's state-law claims against two private contractors—an administrator for Florida's employee health plan and a managed-care company that maintained a preferred-provider network for the plan—for declaratory relief and damages.[39] Although the court "found no case directly on point that has accorded Eleventh Amendment immunity to a private corporation," it granted the defendants immunity nonetheless, relying on cases extending federal sovereign immunity to *Medicare* fiscal intermediaries.[40] Further, the court emphasized that the contract between the hospital and the State, under which the hospital agreed to provide care for state employees, "expressly provides that the penalty for the failure to reimburse claims within thirty days is payment of the full amount of the claims. Such payment for medical services rendered is an obligation of the state."[41] Thus, in *Shands*,

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While *Richardson* was concerned with the lack of governmental control over private prisons, the Court stressed that the bar against suing individuals in their official capacities is designed to protect the state as the real party in interest.

38. 208 F.3d 1308 (11th Cir.2000).

39. *Id.* at 1312-13.

40. *Id.* at 1311. For the reasons discussed above, such cases are inapposite here.

41. *Id.* at 1313.

Florida would have been legally liable for any judgment rendered. By contrast, NHIC has not shown that Texas would bear any legal liability for any damages assessed against NHIC in this case.

Because NHIC has not shown that Texas would be subject to any legal liability for any damages assessed against it, we reverse the district court's judgment granting NHIC's motion to dismiss based on Eleventh Amendment immunity.

REVERSED and REMANDED.

APPENDIX B — ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION FILED MARCH 31, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION M

CIVIL ACTION NO. SA-99-CA-1093-FB

UNITED STATES OF AMERICA, ex rel TONI R. BARRON and VICKY SCHEEL,

Plaintiffs,

VS.

DELOITTE & TOUCHE, LLP., DELOITTE & TOUCHE CONSULTING GROUP, LLC., DELOITTE & TOUCHE CONSULTING GROUP HOLDING, LLC, MEDICAID SOLUTIONS OF TEXAS, and NATIONAL HERITAGE INSURANCE COMPANY

Defendants.

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Memorandum and Recommendation of the United States Magistrate Judge filed in the above styled and numbered cause on September 9,

2002, Relators' Objections to the Memorandum and Recommendations Relating to Dismissal (docket #73), Defendant National Heritage Insurance Company's Response to Relator's Objections to the Magistrate's September 9, 2002 Report and Recommendation (docket #74), and Response Memorandum by Defendants Deloitte & Touche, L. L. P., Deloitte & Touche Consulting Group, L. L. C., and Deloitte & Touche Consulting Group Holding, L.L.C. to Relators' Objections to the Memorandum and Recommendations Related to Dismissal (docket #79). The Court has also reviewed the United States of America's Advisory to the Court (docket #72) as well as Relator's Advisory to the Court (docket #76).

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of them. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Memorandum or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous,

conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has reviewed the objections to the Memorandum and Recommendation along with defendants' responses and has conducted a de novo review of the Magistrate Judge's Memorandum and Recommendation. Based on the Memorandum and the Defendants' Responses (docket #s 74 & 79), the Court finds the objections to the Magistrate Judge's Recommendation are without merit. This Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Memorandum and Recommendation issued September 9, 2002 (docket #70), and incorporates herein the arguments and authorities presented by the defendants in their respective responses. Therefore, the Memorandum and Recommendation shall be accepted pursuant to 28 U.S.C. § 636(b)(1) such the motion to dismiss based on lack of subject-matter jurisdiction filed by the Deloitte & Touche defendants should be granted; the motion to dismiss based on lack of subject jurisdiction and sovereign immunity filed by defendant National Heritage should be granted, and the complaint against defendant Medicaid Solutions of Texas should also be dismissed based on lack of subject matter jurisdiction.

Accordingly, it is hereby ORDERED that the Recommendation of the United States Magistrate Judge, filed in this case on September 9, 2002 (docket #70), is ACCEPTED such that the motion to dismiss based on lack of subject-matter jurisdiction filed by the Deloitte & Touche defendants (docket #18) is GRANTED; the motion to dismiss

based on lack of subject-matter jurisdiction and sovereign immunity filed by defendant National Heritage (docket #21) is GRANTED; the complaint against defendant Medicaid Solutions of Texas is DISMISSED based on lack of subject matter jurisdiction,[1] and this case is DISMISSED. Motions pending, if any are also DISMISSED.

It is so ORDERED.

SIGNED this 31st day of March, 2003.

s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

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1. As set forth in the Memorandum and Recommendation, defendant Medicaid Solutions of Texas did not file a dispositive motion. However, the Magistrate Judge found the tack of subject matter jurisdiction finding as to Deloitte & Touch and National Heritage also inures to the benefit of defendant Medicaid Solutions. The Court hereby accepts that recommendation as well.

APPENDIX C — MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION FILED SEPTEMBER 9, 2002

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

CIVIL NO. SA-99-CA-1093-FH

UNITED STATES OF AMERICA ex rel TONI R. BARRON and VICKY SCHEEL

Plaintiffs,

DELOITTE & TOUCHE, LLP., DELOITTE & TOUCHE CONSULTING GROUP, LLC., DELOITTE & TOUCHE CONSULTING GROUP HOLDING, LLC., MEDICAID SOLUTIONS OF TEXAS, and NATIONAL HERITAGE INSURANCE COMPANY,

Defendants.

MEMORANDUM AND RECOMMENDATION

Before the Court are defendants Deloitte & Touche, LLP, Deloitte & Touche Consulting Group, LLC, Deloitte & Touche Consulting Group Holding LLC (hereafter collectively referred to as Deloitte & Touche) and National Heritage Insurance Company's (National Heritage) motions to dismiss. (Docket nos. 18 and 21). Relators, Toni Barron and Vicky Scheel (Barron and Scheel), have responded to each. (Docket nos. 51 and 61). The Court concludes Deloitte

& Touche's motion to dismiss should be **GRANTED** for lack of subject-matter jurisdiction, and National Heritage's motion to dismiss should be **GRANTED** based upon lack of subject-matter jurisdiction and sovereign immunity.[1]

Subject to this recommendation, this Court also concludes that, although service was improper, Deloitte & Touche's and National Heritage's motions to dismiss based upon insufficient service of process should be **DENIED**. Should the District Court reach this argument, Barron and Scheel should be allowed sufficient time to re-serve Deloitte & Touche and National Heritage. Alternatively, Deloitte & Touche and National Heritage contend Barron and Scheel failed to plead the fraud claim with sufficient particularity and move to dismiss on this basis. This Court declined to analyze this argument because Barron and Scheel have contemporaneously been granted leave to file an amended complaint. Deloitte & Touche and National Heritage also move to dismiss Barron and Scheel's complaint for failure to state a claim upon which relief can be granted. Should the District Court reach this argument, this Court concludes Deloitte & Touche's and National Heritage's motions to dismiss on this basis should be **DENIED**.

Factual Background

Barron and Scheel bring this *qui tam* lawsuit, on behalf of the United States of America, alleging causes of action

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1. Defendant Medicaid Solutions of Texas has not filed a dispositive motion. However, the finding that subject matter jurisdiction is lacking inures to that defendant's benefit as well. Therefore, Medicaid Solutions of Texas should also be dismissed as a defendant.

under the False Claims Act. Under the Individuals with Disabilities Education Act (IDEA), school districts must provide each child, regardless of disabilities or income, with a free and public education, which may include special education and related services for any disabilities. Relator Toni Barron is an independent speech language pathologist, and provided speech therapy services to students qualified to receive these services. Barron operated under a contract with the Judson Independent School District and the Southwest Independent School District. Relator Vicky Scheel is an independent physical therapist and provided services to students qualified to receive her services pursuant to a contract with the Judson Independent School District and the Northeast Independent School District.

Under the IDEA, when services are deemed to be medically necessary, a portion of the cost of these services may be reimbursed to the school districts by Medicaid, under a program titled, School Health and Related Services (SHARS). This suit focuses on funds derived through the SHARS program from Medicaid. Each state is permitted to establish its own state plan for eligibility standards, rates for payments, and scope of services within the SHARS program, although Medicaid is funded jointly by the federal and state governments. The Texas Education Agency and the Texas Department of Health contracted with Deloitte & Touche and Medicaid Solutions of Texas (Medicaid Solutions) to provide billing and consulting services to the SHARS providers in Texas. The Texas Department of Health contracted with National Heritage to be the administrator and fiscal agent of all Medicaid programs, including SHARS, to process and pay valid Medicaid claims to the school districts. National

Heritage would then submit claims to Medicaid for appropriate federal reimbursement.

Basically, Barron and Scheel allege in this action Deloitte & Touche and Medicaid Solutions caused the school districts to bill Medicaid for services that were not medically necessary or otherwise valid claims under the SHARS Medicaid program. Barron and Scheel allege National Heritage failed to adequately monitor submitted SHARS claims for accuracy and validity before submitting them for final payment to the United States. Barron and Scheel allege that, together, the defendants knowingly submitted false claims for Medicaid reimbursement and knowingly made or used or caused to be made or used false records or statements to get false claims paid through Medicaid reimbursement.

Barron and Scheel originally filed this action on April 8, 1998, but subsequently voluntarily dismissed the action without prejudice. Following hearings by the Senate Finance Committee on issues relevant to this lawsuit in June 1999, Barron and Scheel then filed this pending action on September 30, 1999, alleging the same facts and causes of action as the previous suit. As required in *qui tam* lawsuits, the complaint was sealed. Barron and Scheel then proceeded to request intervention by the United States of America. However, the United States twice declined to intervene. Consequently, on February 24, 2000, this District Court ordered the complaint to be unsealed and ordered Barron and Scheel to serve all defendants with summons and a copy of the complaint pursuant to the Federal Rules of Civil Procedure. Due to oversight, the District Clerk's Office did not unseal the complaint, nor did it "enter" the filed pleadings

and documents on the Court's docket; however, it did mail the February 24, 2000 order to Barron and Scheel's attorney.

On April 4, 2000, this District Court ordered the parties to file scheduling recommendations. On April 7, 2000, the District Clerk's Office unsealed the complaint and "entered" it on the docket. On April 10, 2000, the District Clerk's Office "entered" all other previously filed pleadings and documents on the Court's docket. Consequently, the Court's docket reveals the date all pleadings, documents, and orders were filed with the Court prior to April 10, 2000, but reveal the documents were "entered" on April 10, 2000. Barron and Scheel served all defendants with process on August 4, 2000, and August 7, 2000, by certified mail with return receipt requested.

As required by the Federal Rules of Civil Procedure, prior to filing an answer to the complaint, Deloitte & Touche and National Heritage moved to dismiss the complaint for many reasons, including whether the statute upon which Barron and Scheel based their complaint was unconstitutional. Prior to the time for Barron and Scheel to respond to these defendants' motions to dismiss, on June 15, 2001, this District Court granted Deloitte & Touche's unopposed motion to stay the litigation pending the Fifth Circuit's determination of a case which would decide the issue whether the statute upon which Barron and Scheel based their complaint was constitutional. The District Court denied these defendants' motions to dismiss subject to reurging after the stay was lifted.

Appendix C

The stay in the litigation was lifted on March 1, 2002. Subsequently, Deloitte & Touche and National Heritage reurged these motions to dismiss, excluding the issue of constitutionality, and Barron and Scheel have responded to each. This Court will first determine Deloitte & Touche's motion to dismiss and then proceed to National Heritage's motion to dismiss.

I. DELOITTE TOUCHES MOTION TO DISMISS

Deloitte & Touche moves to dismiss Barron and Scheel's complaint with prejudice based upon the following contentions: (1) the allegations underlying the complaint have been previously and publicly disclosed, thereby triggering a statutory jurisdictional bar; (2) Barron and Scheel failed to effect timely and proper service of process; (3) the complaint fails to sufficiently plead the fraud claim.

A. Subject-Matter Jurisdiction

The False Claims Act bars certain *qui tam* actions by providing its own jurisdictional limitation, stating:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the original source of the information.

> (B) For purposes of the paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on that information.

31 U.S.C. § 3730(e)(4)(A), (B). To determine subject-matter jurisdiction over a suit brought under the False Claims Act, therefore, this Court must determine whether there has been a "public disclosure" of the allegations or transactions forming the basis of the lawsuit. ***Federal Recovery Servs., Inc. v. United States***, 72 F.3d 447, 450 (5th Cir. 1996); ***United States ex rel. Richardson v. E-Systems, Inc.***, No. 3:90-CV-0607-P (N. D. Tx. 1999), at *1-2; ***see also United States ex rel. E. Hafter, D.O. v. Spectrum Emergency Care, Inc.***, 190 F. 3d 1156, 1161 (10th Cir. 1999); ***Cooper v. Blue Cross & Blue Shield of Fl., Inc.***, 19 F.3d 562, 565 n.4 (11th Cir. 1994). If so, the Court must determine whether the action is based upon such public disclosure. ***Federal Recovery Servs., Inc.***, 72 F.3d at 450. In addition, the Court must determine whether the exception to the general rule of jurisdiction applies: whether the relator is the "original source of the information."[2] ***See id.; 31 U.S.C. § 3730(e)(4)(A), (B).***

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2. The cited cases state that this Court's jurisdictional inquiry is a three-or-four part test, starting with the issue whether there was a public disclosure of the information, and if so, whether this information serves as the basis of the lawsuit, and if so, whether the relator is the "original source." However, the statute specifies the last issue of this inquiry, i.e. whether the relator is the original source,

(Cont'd)

Appendix C

Statutes which confer jurisdiction on federal courts must be strictly construed and any doubt must be resolved against federal jurisdiction. ***Boelens v. Redman Homes, Inc.***, 748 F.2d 1058, 1067 (5th Cir. 1984); ***United States ex rel. Johnson v. Shell Oil Co.***, 33 F.Supp.2d 528, 532-533 (E.D.TY. 1999). The relator in a *qui tam* action bears the burden of proof of jurisdiction, which includes alleging facts sufficient to establish jurisdiction and supporting those facts with competent proof. ***United States ex rel. Fine v. MK-Ferguson Co***., 99 F.3d 1538, 1543-1544 (10th Cir. 1996). Mere conclusory allegations of jurisdiction are insufficient. ***Penteco Corp. Ltd. Partnership v. Union Gas Sys. Inc.***, 929 F.2d 1519, 1521 (10th Cir. 1991). If relators fail to meet this burden, the Court must dismiss the suit for lack of jurisdiction pursuant to Rule 12(b)(1), Fed.R.Civ.P.

(Cont'd)

as an exception to the general rule of jurisdiction by stating "No court shall have jurisdiction . . . unless" the action is brought by the original source. Meaning, the court will have jurisdiction over an action even if there has been a public disclosure of information and this forms the basis of the lawsuit, if the relator is the original source of the information. Consequently, the issue of "original source" need not be the third, or last, prong of a sequential inquiry, but can be determined first because if this issue is answered affirmatively, the issue of public disclosure is irrelevant. Likewise, if a court determines there has been no public disclosure, or the action is not based upon a public disclosure, the issue of "original source" is irrelevant. In any event, without precedent following this reasoning, this Court will follow the traditional, sequential analysis, beginning with the issue of "public disclosure", even though the parties dispute focuses on whether Barron and Scheel are the original source of the information, and this issue could be dispositive of the entire dispute of subject matter jurisdiction.

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Barron and Scheel's burden of proof is complicated by the disjunctive and negative wording of Section 3730 (e) (4) (A) and courts' precedential interpretation of the statute. Under the first two prongs of the precedential jurisdiction test, Barron and Scheel must show there was no public disclosure of the allegations or transactions forming the basis of the lawsuit and, even if one did occur, the action before the Court is not based upon such public disclosure. ***See Federal Recovery Servs., Inc.***, 72 F.3d at 450-451; ***United States ex ref. Richardson v. E-Systems, Inc.***, No. 3:90-CV-0607-P, at *1-2; ***see also United States ex rel. E. Hafter, D. O.***, 190 F.3d at 1161; ***Cooper v. Blue Cross & Blue Shield of Fl., Inc.***, 19 F.3d 562, 565 n.4 (11th Cir. 1994). Therefore, Barron and Scheel must prove the negative to prove jurisdiction. If Barron and Scheel satisfy this burden, this Court has jurisdiction over the *qui tam* action. However, even if they satisfy their statutory burden of proof, under the interpretative test, Barron and Scheel then have the additional burden of proof to show they are the original source of the information to avoid any possible jurisdictional bar in the event the defendants allege they are not the original source. ***See Federal Recovery Servs., Inc.***, 72 F. 3d at 450-451.

1. Public Disclosure

The "public disclosure" determination requires a two-part analysis: (1) whether the alleged disclosure originated in one of the sources enumerated in the False Claims Act; (2) whether the critical elements of the alleged fraudulent transaction were disclosed in the public domain. ***Federal Recovery Servs., Inc.***, 72 F.3d at 451; ***United States ex rel. Johnson***, 33 F.Supp.2d at 540-541. Deloitte & Touche

argues there was a public disclosure of the critical elements of the alleged fraudulent transaction in this case on June 17, 1999, when the Senate Finance Committee met to hear testimony about potentially improper submissions of Medicaid claims for school-based health services. Deloitte & Touche attach excerpts of testimony transcript to prove public disclosure forming the basis of the lawsuit, and the lawsuit is, in fact, based upon the fraudulent allegations raised in these public disclosures. ***See Deloitte & Touche's Exh. A,B,C***. However, as discussed, the jurisdiction burden of proof falls on Barron and Scheel to show there was no public disclosure.

Barron and Scheel fail to contest Deloitte & Touche's arguments regarding the first two prongs of the jurisdiction test. Instead, Barron and Scheel seemingly concede these points and skip right to the third prong: whether they are the original source of the information. To present this argument, Barron and Scheel provide a chart of the chronology of events leading up to the filing of this lawsuit. This chart seemingly admits a public disclosure took place by placing a heading on one of the columns titled "Public Disclosures: U.S. Senate Finance Committee-June 17, 1999." **See Relator's response to Deloitte & Touche's motion to dismiss, pp. 11-18, column 4**. Barron and Scheel provide no evidence to satisfy their burden of proof to show there was no public disclosure.

Consequently, this Court must conclude, based upon the evidence submitted by Deloitte & Touche, the seeming admission by Barron and Scheel, and the lack of evidence provided by Barron and Scheel, that there was a public disclosure and the information provided therein forms the

basis of this lawsuit. With this, subject matter jurisdiction is destroyed, and under the traditional, precedential test, the inquiry would stop here. ***See 31 U.S. C. § 3730(e)(4)(A)***; ***see also Federal Recovery, Inc.***, 72 F.3d at 450-451. However, Barron and Scheel argue they are the original source of the information, and under the statute, if they can prove this, subject matter jurisdiction is restored. Therefore, this Court will proceed to this argument.

2. Original Source

If the answer to the issue whether Barron and Scheel are the original source of the information forming the basis of this lawsuit is affirmative, this Court possesses subject matter jurisdiction, and the issue of public disclosure is irrelevant. ***See 31 U.S.C. § 3730(e)(4)(A), (B)***. Pursuant to the requirements of the False Claims Act, to qualify as an original source, Barron and Scheel must demonstrate: (1) they have direct and independent knowledge of the information on which the allegations are based, and (2) they voluntarily provided such information to the government prior to filing suit. ***See United States ex rel. Rafter, D. O.***, 190 F. 3d at 1161 (**quoting *United States ex rel. Precision Co. v. Koch Indus., Inc.***, 971 F. 2d 548, 553 (10th Cir. 1992)). "Direct knowledge" means first-hand knowledge of the material elements of the alleged fraud which the relator has gained through his "'own efforts and not acquired from the labors of others.'" ***United States ex rel. Johnson***, 33 F.Supp.2d at 541 (citing ***Federal Recovery Servs., Inc.***, 72 F.3d at 452). "Independent knowledge" is "'knowledge that is not itself dependent on a public disclosure'" and knowledge which is not "'derivative of the information of others. . . .'" ***United***

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States ex rel. Johnson, 33 F.Supp.2d at 542 (***quoting United States ex rel. Springfield Terminal Railway Co. v. Quinn***, 14 F.3d 645, 656 (D.C. Cir. 1994) and ***United States ex rel. Fine v. Advanced Sciences, Inc.***, 99 F.3d 1000, 1006-07 (10th Cir. 1996), respectively).

Barron and Scheel contend they can prove they are the original source of the information upon which the allegations are based because they filed their first complaint in 1998, prior to the Senate Finance Committee Hearings, which Deloitte & Touche alleges is the public disclosure divesting this Court of jurisdiction. After they filed the first lawsuit in 1998, Barron and Scheel allege they also had "numerous communications" with "Officials from the United States Government," listing the communications' dates, forms, and participants. Barron and Scheel also provide in their response a chronological table showing the timing of these communications, the complaints filed, and the Senate Hearing.[3] However, the evidence submitted by Barron and Scheel to support their response to Deloitte & Touche's motion to dismiss is insufficient to satisfy their burden of proof on the issue whether the information was gained through their own independent efforts and whether the information was voluntarily provided to the Government prior to filing this lawsuit. Barron and Scheel provide no

3. While this chronological table is helpful in presenting their argument, it is not competent evidence of the jurisdictional matters to be proven. Barron and Scheel provide nothing to verify or corroborate this information, and it appears in their argument, only, not as evidence. For this Court to consider this chronological table as true evidence, Barron and Scheel must provide verification and must substantiate the content through competent evidence.

evidence to show they gained any knowledge of the fraudulent activity through their own efforts, and therefore, have failed to satisfy the first prong of their burden of proof on the issue whether they are the original source of the information.

In support of the second prong of their jurisdictional burden of proof, i.e. whether they voluntarily provided this information to government officials, Barron and Scheel provide a telephone-bill record of "Michael Scheel," presumably relator Vicki Scheel's husband. See Relator's Exh., tab 4. This record is not verified. The record presumably contains a listing of all telephone calls made from January 25, 1999, to February 16, 1999, by this customer. On this record, beside specific calls made, are handwritten notations of names, presumably referring to the person spoken to. Barron and Scheel contend these people are various agents of the U.S. Department of Health and Human Services and these conversations regarded the subject matter of this lawsuit. These contentions are also not attested to or verified.

This archaic listing of telephone calls is insufficient to show Barron and Scheel both gained independent knowledge of the information forming the basis of this lawsuit and is insufficient to show they voluntarily surrendered any information to the proper Government officials prior to filing this lawsuit. This telephone record does not prove the content of any relative discussions with any government officials, nor does it verify that these phone numbers are those of the purported government officials. All this exhibit proves is that someone placed telephone calls from a number registered to "Michael Scheel, " to certain telephone numbers, on specific

dates prior to this lawsuit, and spoke for a certain amount of time. Barron and Scheel provide no other evidence pertaining to the issue whether they are the original source of the information forming the basis of this lawsuit, not even a personal affidavit. Barron and Scheel provide no evidence pertaining specifically to relator Toni Barron.

On this same date, this Court has granted Barron and Scheel's second motion to supplement exhibits. In this motion, Barron and Scheel provide as additional evidence to support their original source argument Deloitte & Touche's reply memorandum in support of its motion to dismiss in a similar, but different lawsuit, ***United States ex rel. Gudur v. Texas Dep't of Health***. In the Gudur lawsuit, the relator alleges Deloitte & Touche committed similar fraudulent acts related to its billing practices to Medicaid under the SHARS program. ***See Relator's second motion to supplement exhibits, p. 1.*** Barron and Scheel contend that in this reply memorandum in the ***Gudur*** suit, Deloitte & Touche admits Barron and Scheel are the original source of the information forming the basis of this lawsuit.

In this reply memorandum, Deloitte & Touche argues the relator in the ***Gudur*** suit fails to satisfy his burden of proof on the public disclosure prong because (1) there was a prior published General Accounting Report; (2) there was the prior Senate Finance Committee Meeting; and (3) this lawsuit based upon the same allegations of a fraudulent scheme was filed prior to that lawsuit. Barron and Scheel attempt to argue that these arguments by Deloitte & Touche amount to a judicial admission that Barron and Scheel are the original source of the information forming the basis of

this lawsuit. This argument fails. The reply memorandum filed by Deloitte & Touche in the ***Gudur*** lawsuit does not amount to a judicial admission in this lawsuit, nor does it serve as evidence of Barron and Scheel's burden of proof. In addition, the statements made in the reply memorandum do not admit that Barron and Scheel are the original source of the information forming the basis of this lawsuit, but argue only that a prior public disclosure of the information forming the basis of that lawsuit occurred, namely this lawsuit. ***Id. at 2,4,6-8***. Therefore, even with the submission of the supplemental exhibit, Barron and Scheel have failed to satisfy their burden of proof on the issue whether they are the original source of the information forming the basis of this lawsuit.

Because the evidence presented is insufficient to satisfy Barron and Scheel's burden of proof on this prong of the jurisdictional issue, this Court concludes Barron and Scheel have failed to show there was no public disclosure and have failed to show they are the original source of any information forming the basis of this lawsuit. Therefore, Barron and Scheel have failed to prove this Court possesses subject-matter jurisdiction over this lawsuit. For these reasons, this Court recommends Deloitte & Touche's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) be ***GRANTED***.

B. Service of Process

Although this Court recommends Deloitte & Touche's motion to dismiss be granted, it will discuss the remaining issues in the alternative, should the District Court reach these issues. Deloitte & Touche contends Barron and Scheel's

complaint should be dismissed with prejudice because they failed to effect proper and timely service of process. Specifically, Deloitte & Touche contends Barron and Scheel should have served it with process on or before June 24, 2000, or within 120 days from February 24, 2000, the date the District Court ordered the complaint be unsealed and served upon all defendants. Deloitte & Touche also contends service was ,improper because it was effected through the United States' mail by Barron and Scheel's attorney. Deloitte & Touche contends this avenue of service is not available for service of process pursuant the Federal Rules of Civil Procedure and cannot be done by the relators' attorney, who is an interested party.

Barron and Scheel respond that the 120 days within which they must serve process began to run on the date the District Clerk's office "entered" the District Court's order dated February 24, 2000, on its docket, or April 10, 2000. Pursuant to this timeline, Barron and Scheel contend their service of process as to the Deloitte & Touche group members on August 4, 2000, and August 7, 2000, was timely. Further, Barron and Scheel contend the Federal Rules of Civil Procedure allow for service of process via the United States' mail by their attorney.

1. Timeliness of Service of Process

Federal Rule of Civil Procedure 4(m) requires a plaintiff to serve all defendants with a copy of the complaint and the summons within 120 days after the filing of the complaint. **FED. R. CIV. P. 4(m)**. The purpose of Rule 4 (m) is to ensure the defendants will be promptly notified of any impending

lawsuit to prevent any possible prejudice resulting from delay, such as, loss of evidence, dimming of witness' memory, financial commitments based upon not being sued, etc., and to give the Court jurisdiction over the defendants. ***See Electrical Specialty Co. v. Road & Ranch Supply, Inc.***, 967 F.2d 309, (9th Cir. 1992); ***Bennet v. Circus U.S.A.***, 108 F.R.D. 142, 148 (N.D. Ind. 1985). If service is not made within 120 days of the filing of the complaint, the court "shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time" unless the plaintiff can demonstrate good cause for the failure to complete service within the required time. ***Id.*** Plaintiffs bear the burden of proof in demonstrating good cause for any failure to comply with the 120-day time limit. ***See Systems Signs Supplies v. United States Dep't of Justice***, 903 F.2s 1011, 1013 (5th Cir. 1990). Any dismissal pursuant to Rule 4(m) is without prejudice. ***See Norfolk v. City of Garland***, 768 F.2d 654, 658 (5th Cir. 1988) .

While dismissal was mandatory prior to the 1993 amendments to Rule 4(m), courts subsequently have been given broad discretion in deciding whether to dismiss a case for failure to effect service within the 120-day time limit absent a showing of good cause. ***See Committee Notes to 1993 Amendments to FRCP 4(m)***; ***See also Petrucelli v. Bohringer & Ratzinger GmBH Ausdereitungsanlagen***, 46 F.3d 1298, 1305 (3d Cir. 1995); ***Espinoza v. United States***, 52 F.3d 838, 840 (10th Cir. 1995). In a determination whether to exercise its discretion to dismiss a case for failure to timely serve the defendants, a court may consider such factors as: (1) whether the applicable statute of limitations would bar refiling if the action were dismissed; (2) whether the delay

will prejudice defendant's ability to defend on the merits; (3) whether the defendant is evading service; (4) whether the defendant had concealed a defect in attempted service; or (5) whether service was eventually accomplished, and if so, how long after the 120-day period. ***See Committee Notes to 1993 Amendments to FRCP 4(m)***; ***See also Petrucelli***, 46 F.3d at 1305; ***Goodstein v. Bombardier Capital, Inc.***, 167 F.R.D. 662, 666 (D. Vt. 1996).

In this case, this Court concludes Barron and Scheel have failed to show good cause for their failure to serve the defendants within 120 days of the District Court's order dated February 24, 2000. Although the Court's order was not entered onto the docket until April 10, 2000, this mishap did not have any bearing on the Court's order for Barron and Scheel to serve the defendants with the complaint. Barron and Scheel were aware of this order in sufficient time to timely serve the defendants, or they should have been alerted on April 4, 2000, when the District Court entered its Scheduling Recommendations order. (See Docket No. 9). Consequently, the defendants should have been served with process by June 24, 2000. Barron and Scheel offer no reason other than the delay of entry on the docket for their failure to timely serve Deloitte & Touche. This reason does not establish "good cause."

However, this Court also concludes that based upon the procedural anomalies in this case and after a weighing of the applicable considerations, this Court should exercise its discretion in this matter and decline to dismiss Barron and Scheel's complaint based upon untimely service. First, any dismissal at this stage of the litigation would prevent Barron

and Scheel from refiling because the statute of limitation has expired. Second, Deloitte & Touche received sufficient notice of the impending suit. Finally, the case was stayed pursuant to a motion filed by Deloitte & Touche and unopposed by National Heritage.

Consequently, this action was stayed for approximately one year and 3 months at the behest of Deloitte & Touche and National Heritage, not Barron and Scheel, and as a result, the statute of limitations ran while the parties awaited determination by the Fifth Circuit of a collateral issue. Because the case was stayed on motion by Deloitte & Touche and National Heritage, these parties cannot now argue prejudice by any defect in service of process in the presentation of their defenses. Although this Court does not desire to minimize the importance of timely service of process or ignore the fact that Barron and Scheel failed to adhere to this rule, the Court finds the purpose of Rule 4(m) has been met in this case, despite the untimely service. Consequently, should the District Court reach this issue, the Court recommends Deloitte & Touche's motion to dismiss on the basis of untimely service of process be **DENIED**.

2. Improper Service

Service of process may be effected "by any person who is not a party and who is at least 18 years of age." **Federal Rule Civil Procedure** 4(c)(2). Under the federal rules, a party's attorney qualifies as "any person" and thus can serve process. ***See Jugolinija v. Blue Heaven Mills, Inc.***, 115 F.R.D. 13, 15 (S.D. Ga. 1986). Federal Rule of Civil Procedure 4(e)(1) authorizes a plaintiff to serve process on

an individual defendant according to any of the methods set out therein. **See FEDERAL RULE CIVIL PROCEDURE 4(e)(1).** One of the methods authorized by Rule 4(e)(1) is any service allowed pursuant to the law of the state where the district court is located or where service is effected. **Id.** Further, Rule 4(h) prescribes the proper manner of service of process upon business defendants. Pursuant to Rule 4(h)(1), a plaintiff may effect service upon a business defendant:

> in the manner prescribed for individuals by subdivision (e) (1) , or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

FEDERAL RULE CIVIL PROCEDURE 4(h)(1).

Should a party choose to effect service of process by Texas law under Rule 4(e)(1), pursuant to Texas state law, service of process may be effected by any person authorized by law who is not less than 18 years of age. **TEXAS RULE OF CIVIL PROCEDURE 103.** No person who is a party or who is interested in the outcome of the case may serve any process. ***Id.*** Service of process may be effected by any person authorized by Rule 103 by mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached. **TEXAS RULE OF CIVIL PROCEDURE 106(a)(2).**

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Barron and Scheel contend service of process was proper under a combination of the Federal and Texas Rules of Civil Procedure. They contend they elected to defer to Texas law pursuant to Federal Rule 4(e)(1) and 4(h)(1), and under Texas Rule 106(a)(2), service by certified mail, with return receipt requested, is valid. Further, Barron and Scheel contend Federal Rule 4(c)(2) provides service of process may be effected by a party's attorney.

This Court holds Barron and Scheel cannot sort through the Federal and Texas Rules of Civil Procedure and pick and choose those portions most favorable. Barron and Scheel are correct in asserting Federal Rule 4(e)(1) and 4(h)(1) provides them the opportunity to serve Deloitte & Touche pursuant to Texas law, and Texas Rule 106(a)(2) provides service of process on a business defendant may be effected by mailing it registered or certified mail with a return receipt requested. However, Texas Rule 106 also explicitly states service of process must be effected by someone authorized by Texas Rule 103, and Texas Rule 103 eliminates any person interested in the outcome of the lawsuit. In Texas, a party's attorney is one who is interested in the outcome of the lawsuit under Texas Rule 103, and therefore, eliminated from those available to effect service of process. ***See Jackson v. United States***, 138 F.R.D. 83, 87 (S.D. Tx. 1991); ***HB & WM, Inc. v. Smith***, 802 S.W.2d 279, 281-82 (Tex. App. - San Antonio, 1990, no writ). Although a party's attorney may be given leeway to effect service of process under Federal Rule 4(c)(2), this rule pertains only when those avenues available under the federal rules are chosen, and does not trump the established state law, should a party choose to defer to state law. Consequently, Barron and Scheel's argument that service

of process was proper under a combination of the Federal and Texas Rules is without merit, and must fail.

Barron and Scheel also assert that service of process by mail is proper under Federal Rule 4(h)(1), pursuant to the last phrase, "by also mailing a copy to the defendant." However, Barron and Scheel take this phrase out of context and misconstrue its meaning. Federal Rule 4(h)(1) denotes that if service is made on an agent authorized by statute to accept service, the plaintiff must also mail an additional copy of the summons and complaint to the business defendant, if also required by statute. ***See*** **FEDERAL RULE OF CIVIL PROCEDURE 4(h)(1)**; ***see also Moore's Federal Practice 3d ed. § 5 4.54[1], p. 4-71.*** Consequently, Barron and Scheel cannot rely on this portion of Federal Rule 4(h) to effect service of process by mail under the Federal Rules of Civil Procedure.

However, although service of process was improper, and insufficient service of process destroys this Court's jurisdiction, this Court is not required to grant a motion to dismiss for insufficient service of process, but may elect to quash service and provide ample time for the plaintiff to re-serve the defendant. ***See*** **FEDERAL RULE OF CIVIL PROCEDURE** 4(m); ***see also Adams v. AlliedSigaal Gen. Aviation Avionics***, 74 F.3d 882, 886 (8th Cir 1996). Given the procedural posture of this case and the effective statute of limitations bar should this Court dismiss this case at this stage, this Court concludes granting Deloitte & Touche's motion to dismiss would be inequitable. Consequently, this Court recommends that service of process be quashed and

Barron and Scheel be provided ample time to re-serve Deloitte & Touche, unless Deloitte & Touche agrees to waive such requirement.

3. Waiver of Service of Process

Finally, Barron and Scheel contend Deloitte & Touche waived any objection to service of process by entering a general appearance, and thereby, submitted itself to this Court's jurisdiction. Barron and Scheel contend Deloitte & Touche did this by filing its motion to dismiss raising the insufficient service, by moving to stay the proceeding, by filing an agreed motion to extend the time for Barron and Scheel to respond to its motion to dismiss, by filing an agreed motion to lift the stay, and a motion to re-urge its motion to dismiss, all without specifying these pleadings were subject to a "special appearance."

This Court concludes Barron and Scheel's argument is without merit. Under Federal Rule of Civil Procedure 12 (b) there is no longer any necessity for appearing specially to protest the court's jurisdiction or question the sufficiency of process or service of process. ***See Housing Auth. of the City of Atlanta v. Millwood***, 472 F.2d 268, 272 (5th Cir. 1973). Rule 12 (b) requires only that all such objections be asserted in an answer or motion to dismiss, the procedure followed below by Deloitte & Touche. ***Id.*** Consequently, Deloitte & Touche has not waived any objection to insufficient service of process.

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C. Pleading with Particularity

Deloitte & Touche contend Barron and Scheel's suit should be dismissed with prejudice because they fail to plead the fraud allegations and the facts supporting such allegations with particularity, as required by Federal Rule of Civil Procedure 9(b). Deloitte & Touche bases its arguments related to this issue on Barron and Scheel's original complaint. However on this same date, this Court has granted Barron and Scheel's motion for leave to amend the complaint. Consequently, the parties' discussion of this issue is now moot or inapplicable to the current complaint. Therefore, this Court will not discuss this issue.

II. NATIONAL HERITAGE'S MOTION TO DISMISS

National Heritage moves to dismiss Barron and Scheel's complaint with prejudice based upon the following contentions: (1) the allegations underlying the complaint have been previously and publicly disclosed, thereby triggering a jurisdictional bar; (2) sovereign immunity; (3) the complaint fails to sufficiently plead the fraud claim pursuant to Federal Rule of Civil Procedure 9(b); (4) Barron and Scheel failed to effect timely and proper service of process; and (5) Barron and Scheel fail to state a claim upon which relief can be granted.

A. Subject Matter Jurisdiction

To limit the volume of paper submitted to this Court, National Heritage moves pursuant to Federal Rule of Civil Procedure 10(c), to incorporate and adopt the entirety of

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Deloitte & Touche's argument related to this Court's subject-matter jurisdiction specified in the False Claims Act. This motion will be **GRANTED**. Barron and Scheel also incorporate their entire response in relation to this argument from their response to Deloitte & Touche's motion to dismiss. However, Barron and Scheel submit additional evidence in support of their response as support for this argument. Consequently, this Court will incorporate Barron and Scheel's arguments from their response to Deloitte & Touche's motion to dismiss, but will consider only the evidence submitted in this response to National Heritage's motion to dismiss as support for these arguments.

1. Public Disclosure

As before, and for the same reasons, this Court concludes Barron and Scheel have failed to satisfy their burden of proof regarding jurisdiction by failing to show that a public disclosure forming the basis of this lawsuit did not occur. Barron and Scheel provide no evidence to satisfy their burden of proof to show there was no public disclosure. Consequently, this Court must conclude, based upon the evidence submitted by National Heritage, the seeming admission by Barron and Scheel, and the lack of evidence provided by Barron and Scheel, that there was a public disclosure and the information provided therein forms the basis of this lawsuit.

However, under the exception to this general rule, if Barron and Scheel can show they are the original source of this information, this Court's jurisdiction will be restored. This Court again concludes that Barron and Scheel have

failed to satisfy this requirement. However, because Barron and Scheel have submitted additional evidence pertaining to this prong of their burden of proof, this Court will address this prong, specifically.

2. Original Source

If the answer to the issue whether Barron and Scheel are the original source of the information forming the basis of this lawsuit is affirmative, this Court possesses subject matter jurisdiction, and the issue of public disclosure is irrelevant. ***See* 31 U.S.C. § 3730(e)(4)(A), (B)** . As previously noted, to qualify as an original source, Barron and Scheel must demonstrate: (1) they have direct and independent knowledge of the information on which the allegations are based, and (2) they voluntarily provided such information to the government prior to filing suit. ***See United States ex rel. E. Hafter, D.O.***, 190 F.3d at 1161 (***quoting United States ex rel. Precision Co.***, 971 F.2d at 553).

While Barron and Scheel make these allegations in their complaint and in their response, Barron and Scheel provide no competent evidence to show they gained any knowledge of the fraudulent activity through their own efforts, and therefore, have failed to satisfy the first prong of their burden of proof on the issue whether they are the original source of the information.

As support for their contention they voluntarily provided information to government officials prior to filing suit, Barron and Scheel submit the same telephone records by reference to the evidence submitted in response to the Deloitte

& Touche motion and, additionally, an affidavit by Vickie Scheel. In the affidavit, Scheel attests to the veracity of the telephone records, attests the records are, in fact, her personal records of her telephone, and attests the telephone calls were placed to various government officials to notify them of the allegations forming the basis of the lawsuit. ***See Relator' s Exh. 5***. In her affidavit, Scheel also attests the information provided in Barron and Scheel's table within their response is true "to the best of my knowledge."

Even with the affidavit by Scheel, the Court concludes Barron and Scheel have failed to satisfy their burden of proof on this prong. Barron and Scheel still fail to provide any evidence relative to Toni Barron. Even with Scheel's affidavit, all the evidence shows is Scheel made telephone calls to various numbers from January 25, 1999, to February 16, 1999. She does not testify which governmental officials or agencies were called, nor does she provide any specific information regarding the content of any of these discussions. Barron and Scheel provide no other evidence pertaining to the issue whether they are the original source of the information forming the basis of this lawsuit. Because the evidence presented is insufficient to satisfy Barron and Scheel's burden of proof on this prong of the jurisdictional issue, this Court concludes Barron and Scheel have failed to prove this Court holds subject matter jurisdiction over this lawsuit.

Even with Scheel's affidavit, Barron and Scheel have failed to satisfy their burden of proof to show this Court holds subject matter jurisdiction. First, Barron and Scheel admit there was a public disclosure and provide no evidence which

would show there was no public disclosure. Next, Barron and Scheel have failed to satisfy their burden of proof on the exception to the general rule of jurisdiction be failing to provide sufficient evidence which would prove they are the original source of the information forming the basis of this lawsuit. Barron and Scheel have not provided any evidence they attained the information independently through their own personal efforts. Based upon this, the Court could end its inquiry and find there is no subject matter jurisdiction. However, Barron and Scheel have also failed to satisfy the second prong of the original source inquiry by failing to provide sufficient and competent evidence they voluntarily surrendered any of this information to the proper Government officials prior to filing this lawsuit. For these reasons, this Court recommends National Heritage's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) be **GRANTED.**

B. Sovereign Immunity

National Heritage contends it is immune from suit, because it is an "arm of the State of Texas," and therefore, entitled to sovereign immunity under the Eleventh Amendment. National Heritage argues it is an agent of the State of Texas, acting under statutory authority to administer the Medicaid-reimbursement programs. Because it acted solely under the control and supervision of the State of Texas in carrying out these responsibilities entrusted to it by statute, National Heritage contends it is entitled to sovereign immunity as an "arm of the state".

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Barron and Scheel contend National Heritage is not an "arm of the state," but is an independent, for-profit company which is contracted to ensure correct payment of submitted claims under the Medicaid-reimbursement programs such as SHARS. Barron and Scheel include National Heritage in this lawsuit alleging National Heritage failed to accurately fulfill its duties with the State of Texas, thereby allowing payment of nonrefundable claims.

The Eleventh Amendment provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." **U.S. CONST., AMEND. XI**. In addition, Eleventh Amendment immunity extends to suits brought against a state by its own citizens. ***Pennhurst State Sch. & Hosp. v. Halderman***, 465 U.S. 89, 100 (1984). The Eleventh Amendment operates as an absolute jurisdictional bar to suits against a state in federal court, unless the state consents. The State of Texas does not consent to be sued in federal court.

Eleventh Amendment immunity also applies to actions in federal court against state agencies and other private agents of a state who are authorized to carry out State responsibilities "when the action is, in essence one for the recovery of money from the state. . . ." ***See Ford Motor Co. v. Dept of Treasury***, 323 U.S. 459, 464 (1945): ***Karpovs v. State of Mississippi***, 663 F.2d 640, 642 (5th Cir. 1981). Therefore, private entities that serve a public function may be entitled to sovereign immunity. ***United States v. Mack***, 48 F.Supp.2d 708, 713 (S.D. Tx. 1999): ***Citrano v. Allen Correctional Ctr.***, 891

F.Supp 312, 320-321 (W.D. La. 1995). Particularly, "fiscal intermediaries" for a state or state agency, which simply administer a state responsibility, are entitled to sovereign immunity as the state, itself, when such intermediaries act within their official capacity. ***Matranga v. Traveler's Ins. Co.***, 563 F.2d 677, 678 (5th Cir. 1977).

The question, then, that this Court must first determine is whether National Heritage is so related to the State of Texas that the suit against it is actually a suit against the State of Texas, and therefore, barred by the Eleventh Amendment. ***Mt. Healthy City Bd. of Educ. v. Doyle***, 429 U.S. 274, 280 (1976). In Eleventh Amendment cases, the question whether the state is "the real party in interest" is one of federal law, but federal courts must examine the powers, characteristics, and relationships created by state law to determine whether the suit is actually against the state itself. ***Regents of the Univ. of Cal. v. Doe***, 519 U.S. 425, 429-30 (1997). "The answer depends, at least in part, upon the nature of the entity created by state law." ***Mt. Healthy City Bd. of Educ.***, 429 U.S. at 280. Courts must examine the following six factors in this determination: (1) whether the statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to state-wide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. ***Hudson v. City of New Orleans***, 174 F.3d 677, 681 (5th Cir. 1999). Most importantly, the Court should look at the degree of local autonomy and control, and whether the funds to defray any award would be derived from the state

treasury. ***Laje v. R.F. Thomason General Hospital***, 665 F.2d 724, 727 (5th Cir. 1982). Therefore, a state agent is not immune from suit if it operates independently from the state. Taking the allegations in the amended complaint as true, and examining the record evidence submitted by both Barron and Scheel and National Heritage, this Court concludes the above factors weigh heavily in favor of finding National Heritage to be an arm of the State, and therefore, entitled to sovereign immunity.

First, Texas law allows the responsibility of administering the SHARS Medicaid program to be delegated to a fiscal intermediary. **See Tx. Hum. Res. Cope Ann.** § 32.209(b). The contract language and Barron and Scheel's amended complaint characterize National Heritage's role as a fiscal intermediary, which receives, processes, and pays appropriate Medicaid claims submitted under the SHARS program. Such fiscal intermediaries are "arms of the State" and are, thereby, entitled to sovereign immunity. ***See e.g. Matranga***, 563 F.2d at 678; ***Peterson v. Blue Cross/Blue Shield of Tx.***, 508 F.2d 55, 58 (5th Cir. 1975); ***United States v. Mack***, 48 F.Supp.2d at 713. Even though Barron and Scheel contend National Heritage acted negligently, thereby failing to fulfill its obligation under this contract, as long as it operated within the scope of its authority under the contract, it is still entitled to sovereign immunity. ***Matranga***, 563 F.2d at 678; ***Peterson***, 508 F.2d at 58; ***United States v. Mack***, 48 F. Supp.2d at 713. There is no evidence or allegation National Heritage exceeded the scope of its authority. Therefore, the statute under which National Heritage derives its authority to act on the part of the State of Texas and the contract

language all weigh in favor of finding National Heritage to be an arm of the state for the purpose of this lawsuit under the first prong of the Hudson test.

Also under the first prong of the ***Hudson*** test, District Courts within the Fifth Circuit, including this District Court, have uniformly found National Heritage to be an arm of the state under similar facts and circumstances. ***See e.g., United States ex rel. Churchill v. The State of Texas***, No. A 00-CA-527-SS at *3-7 (W.D. Tx. 2000); ***United States v. Mack***, 48 F.Supp.2d at 713; ***Texas Hosp. Ass'n v. National Heritage Ins.***, 802 F. Supp 1507, 1512 (W. D. Tx. 1992);***St. Joseph Hosp. v. Electronic Data Sys. Corp.***, 573 F.Supp. 443, 450 (S.D. Tx. 1983) (all holding in *qui tam* actions, National Heritage is an arm of the state, and therefore, immune from suit in federal court under the Eleventh Amendment). In particular, in Churchill, National Heritage was contracted by the State of Texas to perform similar duties in the payment of Medicaid claims. Specifically, in ***Churchill***, National Heritage was alleged to have failed to pursue third-party claims prior to submitting a claim for reimbursement for federal Medicaid. The ***Churchill*** Court first placed heavy weight on the fact that many District Courts in Texas have consistently found National Heritage to be an arm of the state in similar factual situations. ***See United States ex rel. Churchill v. The State of Texas***, No. A 00-CA-527-SS, at *4. This Court also places heavy weight on this factor.

In particular, the ***Churchill*** case is a *qui tam* action filed under the False Claims Act with similar facts and allegations as the present suit. After analyzing the remaining ***Hudson*** factors, the Court concluded National Heritage was an arm

of the State. ***Id.*** In ***Mack***, National Heritage operated under a similar contract to administer the Texas Medicaid program, and under this contract, operated as a fiscal intermediary to receive, process, and pay doctors' reimbursable Medicaid claims. ***United States v. Mack***, 98 F.Supp.2d at 712-713. The ***Mack*** Court also concluded National Heritage was an arm of the State after analyzing the pertinent Hudson factors. **Id.** at 713. Therefore, given the contract language, the amended complaint, and persuasive authority from this District, the first factor weighs heavily in favor of a finding of sovereign immunity.

The Court finds the second ***Hudson*** factor also weighs in favor of finding National Heritage to be an arm of the state for the purpose of this lawsuit. The evidence and arguments do not paint a clear picture of the source of the funds to pay any damages assessed against National Heritage. However, cases have held that even though National Heritage is a privately owned company with its own resources to pay a damage award, in cases such as this, National Heritage would use funds derived from the state in its payments for services administered under the contract, and this is enough to hold a judgment against National Heritage would affect the state treasury. ***See United Carolina Bank v. Board of Regents of Stephen F. Austin Univ.***, 665 F.2d 553, 560 (5th Cir. 1982); ***Jagnandan v. Giles***, 538 F. 2d 1166, 1176 (5th Cir. 1976); ***Markowitz v. United States***, 650 F.2d 205, 206 (9th Cir. 1981).

Although it seems far reaching, in this case, National Heritage generates a portion of its income from its contract with the State of Texas. Thus, an award of damages against

National Heritage would be paid out of funds it essentially received from the State of Texas, as National Heritage would not be in a position to be sued if it was not paid by the State of Texas to administer the state's Medicaid program. On this basis, it has been held that a judgment against National Heritage would affect the state treasury. ***See United States ex rel. Churchill v. The State of Texas***, No. A 00-CA-527-SS, at *9-5 (***citing Mack***, 98 F.Supp.2d at 713). Consequently, this factor also weighs in favor of finding National Heritage entitled to sovereign immunity.

The third factor, the degree of autonomy, also weighs in favor of finding sovereign immunity following the reasoning of the ***Churchill*** decision. In ***Churchill***, the Court concluded National Heritage was controlled by the State of Texas by virtue of the contract between the two. ***See United States ex rel. Churchill v. The State of Texas***, No. A 00-CA-527-SS, at *5. National Heritage agreed to administer a responsibility of the State of Texas under its direction. ***Id***. As a contractor, the Court found National Heritage was obligated to follow the policies and procedures set by the State of Texas. ***Id.*** National Heritage did not have the autonomy or authority to deviate from these directives. ***Id.*** This Court finds the same situation in this case. National Heritage is a contractor of the State of Texas, hired to administer the Medicaid funds for appropriate claims. ***See*** **National Heritage's Exh., Tab c; see also Relator's Exh, 1.** The policies and procedures under which National Heritage performs this function are established by the State of Texas. ***See*** **National Heritage's Exh., Tab c, par. 5.** Therefore, the State of Texas exercises control over National Heritage in the distribution of these Medicaid funds, and National Heritage does not exercise any

autonomy or discretion of its own in this realm. Consequently, this Court concludes the third factor weighs in favor of finding National Heritage is entitled to sovereign immunity.

Under the fourth factor, the relevant inquiry is whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants. ***See Pendergrass v. Greater New Orleans Expressway Comm'n***, 144 F.3d 342, 347 (5th Cir. 1998) (***citing Jacintoport Corp. v. Greater Baton Rouge Port Comm'n***, 762 F.2d 435, 439 (5th Cir. 1985) (noting that a state's guarantee of bonds issued by an entity can be evidence, however slight, of state agency status)). In this case, National Heritage operates under its contract with the Texas Department of Health as the payment agent for all Medicaid claims in the State of Texas. Therefore, it operates for the benefit of the state as a whole, not individual, local entities. For this reason, this Court concludes the fourth factor weighs in favor of finding National Heritage is entitled to sovereign immunity.[4]

The parties do not significantly address the fifth and sixth ***Hudson*** factors: whether National Heritage can sue and be sued in its own name and whether National Heritage can hold and use property. The Court concludes that as a private entity, National Heritage has the ability to do these things, and therefore, these factors weigh against a finding of sovereign immunity. However, these factors do not weigh as heavily as those discussed previously. Based upon an analysis of the

4. Barron and Scheel contend this factor is irrelevant when an entity seeking sovereign immunity is a private entity. Therefore, it is presumed Barron and Scheel would not dispute the Court's finding relative to this factor.

relevant factors determinative of sovereign immunity, this Court concludes National Heritage acts as an arm of the State of Texas for the purpose of this lawsuit, and therefore, is entitled to Eleventh Amendment sovereign immunity from suit in federal court. On this additional basis, National Heritage's motion to dismiss should be **GRANTED**.

C. Pleading with Particularity

Like Deloitte & Touche, National Heritage contends Barron and Scheel's suit should be dismissed with prejudice because they fail to plead the fraud allegations and the facts supporting such allegations with particularity, as required by Federal Rule of Civil Procedure 9(b). As before, this Court will not address this issue because Barron and Scheel's motion for leave to amend the complaint was granted on this same date, nullifying these arguments.

D. Service of Process

National Heritage argues, as Deloitte & Touche, Barron and Scheel's complaint should be dismissed with prejudice because they failed to effect proper and timely service of process. Specifically, National Heritage contends Barron and Scheel should have served them with process within 120 days from February 24, 2000, the date this District Court ordered the complaint be unsealed and served upon all defendants. Like Deloitte & Touche, National Heritage also contends service was improper because it was effected through the United States' mail by Barron and Scheel's attorney. In response to National Heritage's arguments, Barron and Scheel incorporate their response to Deloitte & Touche's same contentions.

Appendix C

1. Timeliness of Service of Process

The facts and timeline relative to Barron and Scheel's service of process on National Heritage are the same as those relative to Deloitte & Touche; however, service was executed on August 4, 2000, only. Barron and Scheel have failed to show good cause for their failure to serve National Heritage within 120 days of the District Court's order dated February 24, 2000. However, for the same reasons cited previously, this Court should exercise its discretion in this matter and decline to dismiss Barron and Scheel's complaint. Consequently, the Court recommends National Heritage's motion to dismiss on this basis be **DENIED**.

2. Improper Service

The parties present the same arguments analyzed previously regarding the issue whether service of process was proper because Barron and Scheel served National Heritage by certified mail, return receipt requested, and such process was mailed by Barron and Scheel's attorney. For the same reasons cited previously, this Court reaches the same conclusion as to National Heritage: Barron and Scheel used an improper method to serve process on National Heritage. However, although service of process was improper, and insufficient service of process destroys this Court's jurisdiction, this Court is not required to grant a motion to dismiss for insufficient service of process, but may elect to quash service and provide ample time for the plaintiff to re-serve the defendant. Given the procedural posture of this case and the effective statute of limitations bar should this Court dismiss this case at this stage, this Court concludes

granting National Heritage's motion to dismiss would be inequitable. Consequently, should the District Court reach this issue, this Court recommends service of process be quashed and Barron and Scheel allowed ample time to re-serve National Heritage, unless National Heritage agrees to waive such requirement.

E. Failure to State a Claim

National Heritage contends Barron and Scheel's complaint should be dismissed for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically, National Heritage contends Barron and Scheel fail to specifically describe any statement made by any representative of National Heritage and fail to allege any fact establishing a single element of an claim under the False Claims Act as to National Heritage. Essentially, National Heritage attempts to assert the same arguments it asserted previously in its contention Barron and Scheel failed to satisfy Rule 9(b). Given the fact that this Court has granted Barron and Scheel's motion to amend the complaint on this same date, this argument is now moot or nullified, as it is based upon the previous complaint. Therefore, this Court will not address this issue.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that Deloitte & Touche's motion to dismiss be **GRANTED** based on lack of subject-matter jurisdiction, and National Heritage's motion to dismiss be **GRANTED** based on lack of subject-matter jurisdiction and sovereign immunity. It is

further recommended that the complaint be **DISMISSED** as to Medicaid Solutions for lack of subject matter jurisdiction.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the

unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Servs. Auto. Ass'n***, 79 F.3d 1415, 1428 (5th Cir. 1996).

SIGNED this 6th day of September 2002.

s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 9, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-50507

United States of America, ex rel, TONI R BARRON; VICKY J SCHEEL

Plaintiffs - Appellants

v.

DELOITTE & TOUCHE, L L P; DELOITTE & TOUCHE CONSULTING GROUP, L L C; DELOITTE & TOUCHE CONSULTING GROUP HOLDING, L.L.C.; MEDICAID CLAIM SOLUTIONS OF TEXAS, INC; NATIONAL HERITAGE INSURANCE CO

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/04, 5 Cir., ____, ____ F.3d ____)

Before KING, Chief Judge, REAVLEY and EMILIO M. GARZA, Circuit Judges.

Appendix D

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED as to the Court's published opinion. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED as to the Court's published opinion.

* * *

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge